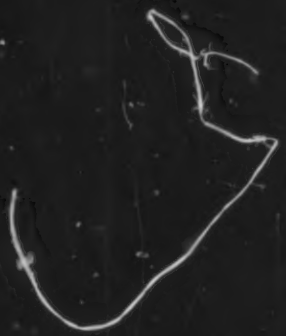

Petition

81-696

NO.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

J. E. GUERTIN CO., RICHARD HOWARTH,

Petitioners,

against

ANDREA CACHAT, an infant over the age of 14 years by her father and natural guardian MARC CACHAT and MARC CACHAT, Individually, and JOHN SCHEUER and JAMES SCHEUER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Of Counsel

Question Presented

Was the July 7, 1981 decision of the New York Court of Appeals that, the decision rendered by this Court, in *Rush* v. *Savchuk*, 444 U.S. 321 (1981), is applied only when a specific objection to the assertion of jurisdiction founded on the attachment of the out-of-state defendant's insurance policy is preserved by appropriate motion or affirmative defense proper and supported by law?

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

The petitioners respectfully pray that a writ of certiorari be granted to review the opinion of the New York Court of Appeals, entered in the within proceeding on July 7, 1981.

Opinions Below

The opinion of the New York Court of Appeals is set forth in the appendix at pages 1a-17a. The opinions of the Appellate Division, First Department are set forth in the appendix at pages 18a-22a. The Order of the New York Supreme Court, Bronx County is set forth in the appendix at pages 23a-25a.

Jurisdiction

The judgment of the New York Court of Appeals was entered on July 7, 1981. This petition for certiorari was filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 USCA 1257(3).

Statutory Provisions Involved

New York State

CPLR 314(3) provides:

> "Service may be made without the state by any person authorized by section 313 in the same manner as service is made within the state:
>
> 3. where a levy upon property of the person to be served has been made within the state pursuant to an order of attachment or a chattel of such person has been seized in an action to recover a chattel.

CPLR 320(c)(i)

> (c) When appearance confers personal jurisdiction, in certain actions; limited appearance. When

the court's jurisdiction is not based upon personal service on the defendant, an appearance is not equivalent to personal service upon the defendant:

1. in a case specified in subdivision (3) of section 314, if jurisdiction is based solely upon a levy on defendant's property within the state pursuant to an order of attachment; or

CPLR 3211(a)(7)(9)(e)

RULE 3211. Motion to dismiss

(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

7. the pleading fails to state a cause of action; or

9. the court has not jurisdiction in an action where service was made under section 314 or 315; or

(e) Number, time and waiver of objections; motion to plead over. At any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a), and no more than one such motion shall be permitted. Any objection or defense based upon a ground set forth in paragraphs one, three, four, five and six of subdivision (a) is waived unless raised either by such motion or in the responsive pleading. A motion based upon a ground specified in paragraphs two, seven or ten of subdivision (a) may be made at any subsequent time or in a later pleading, if one is permitted. An objection based upon a ground specified in paragraphs eight or nine of subdivision

(a) is waived if a party moves on any of the grounds set forth in subdivision (a) without raising such objection or if, having made no objection under subdivision (a), he does not raise such objection in the responsive pleading. Where a motion is made on the ground set forth in paragraph seven of subdivision (a), or on the ground that a defense is not stated, if the opposing party desires leave to plead again in the event the motion is granted, he shall so state in his opposing papers and may set forth evidence that could properly be considered on a motion for summary judgment in support of a new pleading; leave to plead again shall not be granted unless the court is satisfied that the opposing party has good ground to support his cause of action or defense; the court may require the party seeking leave to plead again to submit evidence to justify the granting of such leave.

Statement of the Case

Respondent, Andrea Cachat, a New York resident, was allegedly injured in an automobile accident in Providence, Rhode Island. Jurisdiction was obtained over J. E. Guertin Co., Inc. and Richard Howarth, domiciliaries of Massachusetts by attachment in New York of a policy of insurance issued to them by The Travelers Indemnity Company.

After the summons and complaint were served and defendants answered without raising any jurisdictional objections, defendants moved to dismiss the complaint pursuant to the decision rendered by this Court in *Rush* v. *Savchuk*, 444 U.S. 321.

The New York Supreme Court, Bronx County denied the motion stating that "retroactive application of the *Savchuk* decision would be unjust in that it would deprive litigants of their day in court."

Defendants appealed to the Appellate Division, First Department, where the order of the lower Court was affirmed. [The Appellate Division decided this case in conjunction with *Ranz* v. *Sposato,* 77 A.D. 2d 408 (1981).]

An appeal was then taken to the New York Court of Appeals wherein the decision was that the objection to the quasi-in-rem jurisdiction must have been preserved in the answer in order for the defendant to have the benefit of the decision rendered in *Rush* v. *Savchuk.*

Reason for Granting the Writ

It is the position of the petitioner that the writ should be granted on the ground that the due process clause of the Fourteenth Amendment has been violated by the State of New York, and on the further ground that the New York Courts lack subject matter jurisdiction.

This Court in *Rush* v. *Savchuk, supra,* declared that a state may not make a binding judgment against a foreign defendant with no forum contacts where he has been served outside the state and his insurance policy is attached within the state. The reasoning set forth was that such an exercise of the state's claim of jurisdiction is in violation of the due process clause of the Fourteenth Amendment to the United States Constitution.

The New York Court of Appeals acquiesced to the fundamental Constitutional question but stated that the defense of no quasi-in-rem jurisdiction must be preserved pursuant to CPLR 3211(a)(9).

During the fourteen year life of the Seider doctrine, such a defense was interposed but was repeatedly stricken. It proved to be an exercise in futility. Not to apply *Rush* to those cases where the defense was not preserved is arbitrary and capricious.

A party cannot be deemed to have waived defenses which were unknown to be available at the time they could first have been made, especially when it does raise the defense as soon as it becomes apparent, *Holzsager* v. *The Valley Hospital,* 493 F. Supp. 120, 646 F. 2nd 792 (2d Cir. 1981).

As this Court stated in *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130, 143, 145 (1967):

> "the mere failure to interpose such a defense prior to the announcement of a decision which might support it cannot prevent a litigant from later invoking such a ground. . . . [A]n effective waiver must, as was said in Johnson v. Zerbst, 304 U.S. 458, 464 [1938], be one of a 'known right or privilege. . . .' We would not hold that Curtis waived a 'known right' before it was aware of the New York Times decision. It is agreed that Curtis' presentation of the constitutional issue after our New York Times decision was prompt."

Furthermore the Courts of New York have no jurisdiction over the subject matter of this case. The subject matter is an automobile accident which happened in Rhode Island wherein the plaintiff is a New York resident and the appealing defendant is a resident of Massachusetts. Since the defendant cannot be subjected to the jurisdiction of the New York Courts, it follows that those courts may not adjudicate the rights of the parties to the happening of that accident.

This Court in *Rush* clearly stated that the subject matter of the lawsuit is not the debt owing under the insurance policy but the accident itself. Likewise the real party in interest is not the insurance carrier but the named defendant.

CONCLUSION

For the above reasons, a writ of certiorari, should be issued to review the interlocutory judgment and opinion of the New York Court of Appeals. The decision of the Court of Appeals should be summarily reversed and the complaint dismissed.

Respectfully submitted,

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[APPENDICES FOLLOW]

APPENDIX A

Opinion by the Court of Appeals of the State of New York

This opinion is uncorrected and subject to revision before publication in the New York Reports.

1 No. 360

LUCILLE GAGER, Administratrix &c. of LINDA GAGER, Deceased,

Appellant,

v.

RONALD WHITE,

Respondent.

(360) Stanley Bryer, NY City, for appellant.

Louis G. Adolfsen & Thomas R. Newman, NY City, for respondent.

1 No. 361

MEI YUET CHIN, as Administratrix &c. of YU CHIN, Deceased, and MEI YUET CHIN, individually,

Appellants,

Appendix A

v.

PETER W. CRAY,

Respondent,

&ano.,

Defendant.

(361) Emilio Nunez, Pamela Anagnos Liapakis & Cheryl Eisberg, NY City, for appellant.

William Paul Last & Joseph Arthur Cohen, NY City, for respondent.

1 No. 362

ANDREA CACHAT, *et al.*,

Respondents,

v.

J. E. GUERTIN CO. &ano.,

Appellants,

JOHN SCHEUR & ano.,

Respondents.

(362) James A. Magee, NY City, for appellant.

Norman Bard, NY City for respondent.

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1 No. 363

DEBRA CARBONE,

Appellant,

v.

GAIL W. ERICSON,

Respondent,

&ors.,

Defendants.

(363) Mark J. Roberts & Elliott A. Roberts, NY City, for appellant.

Raymond J. Pezzoli & Joseph W. Conklin, NY City, for respondent.

1 No. 390

SALLIE HILL,

Appellant,

v.

CLARENCE ELLIOTT,

Respondent.

(390) Donald B. Knight, NY City, for appellant.

Louis G. Adolfsen, Thomas R. Newman & L. Kevin Sheridan, NY City, for respondent.

Appendix A

FUCHSBERG, J.

These five appeals are part of the aftermath of the Supreme Court's recent decision in *Rush* v. *Savchuk* (444 US 321), the effect of which was to vitiate the predicate for *quasi in rem* jurisdiction pioneered in 1966 by *Seider* v. *Roth* (17 NY2d 111). In essence, *Seider* held that a liability insurance contract issued by a carrier authorized to do business in this State, contingent as its obligations may be, partakes of the character of a "debt" which by its attachment may be made to serve as the foundation for jurisdiction over its nonresident insured defendants. After this holding had survived fourteen years of doctrinal dispute, *Rush* was to declare it violative of due process. The issue now is whether this ruling is to be applied prospectively alone or retrospectively as well.

The cases on which we are to act present typical *Seider* fact patterns. In each, a New York domiciliary seeks damages for injuries or death sustained in an automobile accident outside the State as a result of the alleged negligence of a nonresident operator or owner of a motor vehicle. Save for the plaintiff's residence, in all, for practical purposes, the sole connection with this State was the policy's availability for attachment.

Because in every instance the cases before us were *pendente lite* when the Supreme Court administered its *coup de grace*, they all became the subject of motions to dismiss. These initially were all denied, *nisi pruis* declining to apply *Rush* to ongoing cases whose plaintiffs, in choosing this forum and foregoing others, had, as these courts saw it, placed justifiable reliance on New York's previously consistent, if vigorously contested, course of decisional support for *Seider's* jurisdictional analysis (see

Appendix A

Baden v. *Staples,* 45 NY2d 889; *Donawitz* v. *Danek,* 42 NY2d 138; *Neuman* v. *Dunham,* 39 NY2d 999; *Simpson* v. *Lochman,* 21 NY2d 305, mot rearg den 21 NY2d 940; see, also, *O'Connor* v. *Lee-Hy Paving Corp.,* 579 F2d 184 cert den 439 US 1034; *Minichiello* v. *Rosenberg,* 410 F2d 106, affd en banc, 410 F2d 117, cert den 396 US 949).

The story in the intermediate appellate courts, however, was different. In *Cachat* v. *J.E. Guertin Co., et al.,* there was an affirmance, but only because no jurisdictional defense had been interposed. On the other hand, because some type of jurisdictional objection had been raised in the other four, each brought a reversal and dismissal. For the reasons that follow, we now hold that *Rush* must be applied only when a specific objection to the assertion of jurisdiction founded on the attachment of the out-of-State defendant's liability insurance policy was preserved by appropriate motion or affirmative defense (CPLR 3211, subd e).

Especially since almost every party touches on the matter, our discussion may well start with the reminder that, consonant with the common law's policy-laden assumptions, a change in decisional law usually will be applied retrospectively to all cases still in the normal litigating process (*People* v. *Pepper,* —— NY2d ——, citing *People* v. *Morales,* 37 NY2d 262, 267-268; *Kelly* v. *Long Island Light Co.,* 31 NY2d 25, 29 n 3). By way of departure from this generality, however, where there has been such a sharp break in the continuity of law that its impact will "wreck more havoc in society than society's interest in stability will tolerate" (Fairchild, Limitation of New Judge-Made Law to Prospective Effect Only: "Prospective Overruling" or "Sunbursting", 51 Marq. L Rev. 254), it is now recognized that, when adherence to the tradi-

tional course is strongly contraindicated by powerful factors, including strong elements of reliance on law superseded by the new pronouncement, a court may direct that it operates prospectively alone (*Chevron Oil Co.* v. *Huson*, 404 US 97; *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.*, 287 US 358).[1]

All the plaintiffs, stressing that the statute of limitations may have foreclosed an action in a forum where jurisdiction would be constitutionally unassailable, argue that theirs are precisely the kind of cases in which restroactive application should be eschewed. But this is by no means a one-sided argument. As the defendants contend, that *Seider* might turn out to have not been the only possible "true rule" was not without forewarning (see, e.g., Siegel, New York Practice, §105, p 127 [1978]; Stein, Jurisdiction by Attachment of Liability Insurance, 43 NYU L Rev 1075 [1968]; Reese, The Expanding Scope of Jurisdiction Over Non-Residents—New York Goes Wild, Ins Counsel J 118 [1968]). Moreover, even if the balance on the issue of prejudice had to be struck in favor of those who preferred only to rely on the authoritative pronouncements of the New York courts rather than those of its now clairvoyant critics, the fundamental nature of

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[1] Although this exceptional technique is usually employed in the criminal law area (see, e.g., *People* v. *Pepper*, —— NY2d ——, *supra; People* v. *Morales*, 37 NY2d 262, *supra*), as the cited cases illustrate, it finds application in the civil sphere as well (see, also, Overruling Decision—Application, Ann., 10 ALR3d 1371).

It is settled that judgments where the normal appellate process has been exhausted may not be collaterally attacked (*Chicot Co.* v. *Baxter State Bank*, 308 US 371, 376; cf. *Vander* v. *Casperson*, 12 NY2d 56).

the jurisdictional determinations in *Rush* renders conventional criteria for fixing an appropriate line of demarcation for overruling academic. For, a constitutional due process limitation on the power of a State's exercise of its jurisdiction under our Federal system of government, as distinguished, for instance, from one founded in due process considerations bearing on less fundamental substantive and procedural concerns, is an absolute abnegation of the offending State's ability to continue to act beyond the boundaries the determination defines.

This observation almost inevitably flows from a review of the conceptional building blocks on which *Rush* stands. They reflect deviation from what for long had come to be the accepted standards for identifying the bounds of the State court basis jurisdiction.[2]

Epitomized by *Pennoyer* v. *Neff* (95 US 714), these were readily divisible into *in personam,* in which the fulcrum was the person; *in rem,* which, applicable to designated property, was designed to affect the interests of all persons; or *quasi in rem* which bore on the interests of particular persons in designated property. The last was of two types. One, like actions to partition land or foreclose a mortgage, was invocable to establish or extinguish claims to or in particular property. The second, the kind involved in the present case, provided a basis for obtaining a judgment to the satisfaction of which the property on which the jurisdiction was based could be applied though

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[2] Basis jurisdiction, sometimes known as "judicial jurisdiction" (Restatement, Conflict of Laws 2d, §§24, 68), is to be distinguished from subject matter jurisdiction, which embraces the competence of a court to entertain a particular kind of litigation (Green, Civil Procedure [2d ed], p 13).

it was not related to the controversy between the parties. (See Restatement, Judgments, §§5-9; Silberman, *Shaffer* v. *Heitner*: The End of an Era, 53 NYU L Rev 33, 39.)

Background too was the requirement for "minimum contacts", integral to "fair play and substantial justice" (see *International Shoe Co.* v. *Washington*, 326 US 310, 316), which, at the time *Seider* came on the legal horizon, had been established as essential to *in personam* jurisdiction, yet was not requisite for *quasi in rem* jurisdiction, for which the presence of property alone sufficed (*Harris* v. *Balk*, 198 US 215; *Pennoyer* v. *Neff*, *supra*).

But *Shaffer* v. *Heitner* (433 US 186) was to eliminate this dichotomy. Noting that "the law of state-court jurisdiction no longer stands securely on the foundation established in *Pennoyer*" and that "judicial jurisdiction over a thing is a customary elliptical way of referring to jurisdiction over the interests of persons in a thing (Restatement [Second] of Conflict of Law, §56, Introductory Note [1971])," it held that "although the presence of the defendant's property in a State might suggest the existence of other ties among the defendant, the State, and the litigation, the presence of the property alone would not support the State's jurisdiction" (*Shaffer* v. *Heitner*, *supra*, pp 206-207, 209). This, of course, still left open the question as to whether the presence in the forum of the defendant's policy and the fact that its carrier was doing business there were enough in the *Seider*-type case to meet these concerns (see Lowenfeld, In Search of the Intangible: A Comment on *Shaffer* v. *Heitner*, 53 NYU L Rev 102).[3]

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[3] Our Court (*Baden* v. *Staples*, 45 NY2d 889, *supra*) and the United States Court of Appeals for the Second Circuit (*O'Connor* v. *Lee-Hy Paving Corp.*, 579 F2d 194, *supra*) were of the view that it did.

In *Rush*, however, the Supreme Court was to dissipate any differences on this subject. It specifically held that cognizable legal fictions, first that, as a form of property, a debt partakes of the situs of the debtor, and, second, that a corporation is to be found wherever it does business, both of which *Seider* entertained, fell short when no more was present in the forum than the liability insurer and its obligation to defend and indemnify. Furthermore, in defining a forum relationship that would meet the re-required standards, the Court made clear that it is not the relation of the plaintiff who seeks the advantage of its forum of choice that carries weight, but rather that of the defendant against whom the litigation is targeted.[4] From there it proceeded to arrive at the evaluation that, in a *Seider* factual framework, "the defendant has *no* contacts with the forum" (emphasis in original). It was on these foundations, which, whatever otherwise has been or can be said on the subject,[5] we have no choice but to accept for the nonce that the Supreme Court concluded that the forum state could impose no binding judgment against

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[4] Although some post-*Seider* decisions theorized that the *Seider* formulation was tantamount to a direct action statute under which a tort plaintiff in essence was proceeding directly against the coverage so that the carrier's and not the tortfeasor's was the interest at stake (see *Donawitz* v. *Danek*, 42 NY2d 138, 142 *supra*; *Minichiello* v. *Rosenberg*, 410 F2d 106, 109, *supra*), in *Rush*, the Court found the analogy inappropriate (*Rush* v. *Savchuk*, 444 US 320, 330-331, *supra*).

[5] See *World-Wide Volkswagen Corp.* v. *Woodson*, (444 US 286, 299, Brennan, J., dissenting). The cited dissent was applied to *Rush* v. *Savchuk* as well.

a *Seider* defendant (*Rush* v. *Savchuk*, 444 US 320, 328-33).[6]

The searching nature of *Rush's* reach for the roots of state judicial jurisdictional power is but a reiteration of the basic principle that "[a] court must have jurisdiction *in rem* or *in personam* in order to enter a valid judgment of any kind . . ." (4 Carmody-Wait 2d, NY Prac §25:3, p 4; accord, *Hanson* v. *Denckla*, 357 US 235, 250). So, with significant contemporaneousness, in *World-Wide Volkswagen* v. *Woodson* (444 US 286, 291), a companion case to *Rush* itself, the Court took the occasion to remind us, once again, that "[a] judgment rendered in violation of due process is void in the rendering State and is not entitled to full faith and credit elsewhere" (emphasis added). Thus, as Dean McLaughlin has noted, "if it violates due process to *commence* an action with jurisdiction resting on the attachment of the defendant's insurance policy, it is difficult to comprehend why it does not also violate due process to *continue* such an action" (1980 Supplementary Practice Commentary C314:4, McKinney's Cons. Laws of NY, Book 7B 1980-81 Supp, p 137, 138-139) (emphasis in text).[7]

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[6] Though a state may interpret its own statute or state constitutional provision more strictly than the Supreme Court interprets the corresponding provision of the Federal Constitution, it may not do so more broadly (*Erlanger Mills* v. *Cohoes Fibre Mills*, 239 F2d 502 [Sobeloff, J.] [North Carolina statute authorizing jurisdiction on a basis broader than the "minimum contacts" of *International Shoe* v. *Washington* (*supra*) held invalid]).

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[7] We have found no case in which a holding that the assertion of basis jurisdiction would violate due process was limited

(Footnote continued on following page)

Appendix A

And, since as we have seen, basis jurisdiction now focuses on a defendant's rights (*World-Wide Volkswagon Corp* v. *Woodson, supra; Kulko* v. *Superior Court,* 436 US 84, 91), any reliance by plaintiffs is irrelevant. Indeed, inasmuch as lack of such jurisdiction can be asserted even after a defense on the merits has been presented (see 4 N.Y. Adv. Comm. Rep. 187 [1960]; *Harkness* v. *Hyde,* 98 US 476), it surely must be given effect here.[8]

That, however, is not the end of the matter. Unlike the subject matter jurisdiction, which limits the power of a particular court rather than the judicial jurisdiction of

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(Footnote continued from preceding page)

to prospective effect. Whatever signpost there is, it goes the other way. So the Supreme Court, though only in dictum in a case concerned with subject matter jurisdiction, recently observed that a jurisdictional ruling by definition can never be so limited (*Fire-Stone Tire & Rubber Co.* v. *Risjord,* —— U.S. ——, 66 L.Ed. 2d 571, 582). While there is a Third Circuit opinion limiting a holding concerning subject matter jurisdiction (*McSparran* v. *Weist,* 402 F2d 867, 876-77 [en banc], cert den 395 US 903), the vitality of that decision would appear to have been sapped by the language in *Firestone.*

[8] For these reasons, we are constrained to reject the provisional contentions of some of the plaintiffs, that, if we hold that their actions do not survive jurisdictionally, their dismissal be conditioned on the defendants' willingness to stipulate that they will not plead the statute of limitations if the suit is pursued in an appropriate forum. Unlike resort to that device in cases of *forum non conveniens,* which presumes the fact of jurisdiction, where basis jurisdiction is lacking there just is no power to condition the dismissal (*Kalman* v. *Neuman,* 80 AD2d 116, 126 n.2 [Lazer, J.]; *Foley* v. *Roche,* 68 AD2d 558, 565-566 [Fein, J.]).

the State *en gros*, a defect in basis jurisdiction is waivable (CPLR 3211, subd e). Under the CPLR, the objection may be raised either by a pre-answer motion or by pleading it as an affirmative defense, whichever comes first (see Siegel, New York Practice, §111, p 137; 4 Weinstein-Korn-Miller; NY Civ Prac, pars 3211.03-3211.05).[9] Absent the pursuit of either course, a defendant's voluntary participation in litigation in which the point can be raised, in and of itself, constitutes a submission to the jurisdiction of the courts of our State and, as such, acts as a predicate for basis jurisdiction (see Restatement, Conflict of Laws 2d, §33; Siegel, *op cit.*, §111, p 139; cf. *York* v. *Texas*, 137 US 15; *Henderson* v. *Henderson*, 247 NY 428).[10]

Examining the cases before us to determine whether *quasi in rem* jurisdiction has been appropriately controverted, we note that specific objections on that score were

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[9] Of course, if a defendant has not appeared at all, there is nothing to preclude essaying a collateral attack on jurisdiction (Restatement, Judgments, §11; see, generally, Chief Judge Desmond's opinion in *Vander* v. *Casperson*, 12 NY2d 56, 59, *supra*).

[10] Historically, where the initial jurisdiction was *in rem* or *quasi in rem*, an appearance, followed by a defense upon the merits, automatically transformed the jurisdictional basis to one that was *in personam* (see Homburger & Laufer, Appearance and Jurisdictional Motions in New York, 14 Buf L Rev 374, 386-388, 406-408; Frummer, Jurisdiction and Limited Appearance in New York: Dilemma of the Non-Resident Defendant, 14 Ford L Rev 73; cf. Restatement of Judgments, §§38-40). Later, this practice was replaced by CPLR 320 (subd c), which provides that when jurisdiction is *quasi in rem*, the appearance remains a limited one. Under these circumstances, the defendant is now permitted to defend without submitting to *in personam* jurisdiction (Siegel, *op cit*, §113, p 140).

made in the answers filed in *Gager* v. *White* and *Hill* v. *Elliott*. In these cases, the Appellate Division's dismissal of the complaints being mandatory, there should be an affirmance.

In contrast, no jurisdictional protest having been lodged in *Cachat* v. *J.E. Guertin Co.*, the Appellate Division also was correct when it there found that dismissal was not in order (CPLR 3211, subd e).[11]

Lastly, in *Chin* v. *Cray* and *Carbone* v. *Erickson*, the answers raised objection to *in personam* jurisdiction only.[12] Since, as explained earlier, a defect in the categorically distinct concept of *quasi in rem* jurisdiction requires a sufficiently particularized pleading to apprise the plaintiff of its nature with sufficient clarity to avoid prejudice by inducing quiescence (compare CPLR 3211, subd a, par [8] with par [9]; see 4 Weinstein-Korn-Miller, NY Civ Prac., par 3211.22, p 32-66), it follows that the *in rem* issue must be deemed waived and the Appellate Division orders, which held to the contrary, reversed.

In sum, the orders in *Gager* v. *White et al*, *Cachat* v. *J.E. Guertin Co., et al.* and *Hill* v. *Elliott* should be af-

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[11] The nearest thing to a jurisdictional defense in *Cachet* was a much different claim, that of defective service.

[12] In *Chin*, in his "Sixth Separate and Complete Affirmative Defense", the answer pleaded that "the court lacks jurisdiction over the person of the defendant".

In *Carbone*, by way of its "Second Defense", the answer pleaded that "this Court does not have jurisdiction over the person of the defendant . . ." and, as a "Third Defense", by way of a limited appearance, pleads that "any judgment . . . may be satisfied only out of the *res* allegedly attached . . .".

firmed, while those in *Chin* v. *Cray, et al.* and *Carbone* v. *Erickson* should be reversed and the orders at Special Term in these cases should be reinstated.[13]

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[13] Finally, the concurrers' comments are quickly met:

First, Erneta v. *Princeton Hosp.* (49 NY2d 829), a memo-less entry, which, following *Rush* by days and here on briefs which had no time to treat with *Rush* or its retroactivity, as Judge Jasen's *Erneta* concurrence so correctly implied, did not scratch the surface.

Secondly, Erneta was a case involving an infant whose time to bring suit in another jurisdiction was still alive because of the toll of the statute of limitations for such plaintiffs.

Thirdly, it therefore comes as no surprise that the most current post-*Rush* comment, emphasizing the need for explication of th issues with which today's opinion treats and specifically referring to the attention both sides of *Rush's* retroactivity issue merit, concludes on the following note: "The magnitude of the impact that [*Rush's*] retroactivity will have on tort victims, who walked the red carpet of *Seider,* thus remains unspoken. And that red carpet was laid down not by legislators, but by judges. Are they really going to pull it in while so many stand on it?" (Seigel, Seider-Overruling Update, New York State Bar Digest, No. 257, May 1981). This more than adequately disposes of the concurring opinion's predeliction for more summary treatment of this case.

Appendix A

Gager v White—No. 360

Chin v Cray No. 361

Cachat v J. E. Guertin Co. et al—No. 362

Carbone v Ericson—No. 363

Hill v Elliott—No. 390

GABRIELLI JONES and WACHTLER, JJ. (concurring:)

We concur in result in each of these cases, but cannot accept what appears to us to be the overbreadth of the majority opinion, addressing matters which are not necessary for the resolution of these appeals.

In *Erneta* v. *Princeton Hosp.* (49 NY2d 829) our Court acknowledged the mandate of the Supreme Court of the United States in *Rush* v. *Savchuk* (444 US 320). In there according retroactivity to the new rule of *Rush*, the Court eschewed the opportunity to indulge in an "institutional reassessment of *Seider* v. *Roth*" (49 NY2d 830). It suffices for present purposes to cite *Erneta*, and to emphasize that inasmuch as the decision in *Rush* is predicated on the nonexistence of jurisdiction, that inhibition extends to judicial action of any sort thereby precluding any of the ameliorative remedies which are pressed on us by plaintiffs who may now be foreclosed from all judicial relief. As the Supreme Court, through Justice Marshall, wrote with respect to an absence of subject matter jurisdiction: "A Court lacks jurisdiction to consider the merits of a case over which it is without jurisdiction, and thus, by definition, a jurisdictional ruling may never be made prospectively only" (*Firestone Tire & Rubber Co.* v. *Risjord*, —— US ——, —— 49 USLW 4089, 4092).

The only new issue presented in these cases relates to questions of waiver of the right to challenge jurisdiction predicated on a *Seider* attachment under the *Rush* decision. We understand the majority to be holding that *Rush* is to be applied retroactively unless in the individual case there has been such a waiver by the defendant (in whatever form or by whatever means effectually manifested). We agree with that principle and concur in its application to the five cases now before us. We are in accord as well that in preserving the *Rush* claim, the defendant must be explicit, by a "sufficiently particularized pleading" or otherwise, to leave no doubt that it is the jurisdictional challenge under what is now the *Rush* doctrine which is being raised. It will not do to raise challenges to personal jurisdiction over the defendant. Accordingly, as the majority correctly concludes, the defendants in *Gager* and *Hill* did not waive their challenges to *Seider* jurisdiction; the defendants in *Mei Yuet Chin, Cachat* and *Carbone* must be held, in consequence of failure to raise the *Rush* defense, now to have waived it.

• • •

In #360—Gager v. *White*:

Order affirmed, with costs.

In #361—Chin v. *Cray*:

Order reversed, with costs, and the order of Supreme Court, Bronx County, reinstated.

In *#362 Cachat* v. *J.E. Guertin Co.*:

Order affirmed, with costs. Question certified answered in the affirmative.

Appendix A

In #363Carbone v. *Ericson*:

Order reversed, with costs, and the order of Supreme Court, New York County, reinstated.

In #390—Hill v. *Elliot*:

Order affirmed, with costs.

Opinion by Fuchsberg, J. All concur, Gabrielli, Jones and Wachtler, JJ., in result in a concurring memorandum.

Decided July 7, 1981

APPENDIX B

Order of the Appellate Division—First Department

(Filed—December 9, 1980)

At a term of the Appellate Division of Supreme Court held in and for the First Judicial Department in the County of New York, on December 9, 1980

Present—

HON. FRANCIS T. MURPHY, JR., Presiding Justices
HAROLD BIRNS
LEONARD H. SANDLER
SAMUEL J. SILVERMAN
MAX BLOOM Justices

9687

ANDREA CACHAT, an infant over the age of 14 years by her father and natural guardian MARC CACHAT and MARC CACHAT, individually,

Plaintiffs-Respondents,

—against—

J. E. GUERTIN CO., RICHARD HOWARTH,

Defendants-Appellants,

and

JOHN SCHEUER and JAMES SCHEUER,

Defendants-Respondents.

Appendix B

An appeal having been taken to this Court by the defendants-appellants from an order of the Supreme Court, Bronx County (Bloustein, J.), entered on or about June 5, 1980 denying appellants' motion to vacate an order of attachment and dismiss the action, and said appeal having been argued by Mr. James A. Magee of counsel for the appellants, and by Mr. Norman Bard of counsel for the plaintiffs-respondents; and due deliberation having been had thereon,

It is ordered that the order so appealed from be and the same is hereby affirmed without costs and without disbursements. See *Ranz* v. *Sposato* (App. No. 8932, —— A D 2d ——) decided simultaneously herewith. [Murphy, P. J., dissents in a memorandum.]

ENTER:

JOSEPH J. LUCCHI
Clerk

Appendix B

**Dissenting Opinion of the Appellate Division—
First Department**

Murphy, P.J., Birns, Sandler, Silverman, Bloom, JJ.

9687

ANDREA CACHAT, an infant over the age of 14 years, etc., and MARC CACHAT, individually,

Plaintiffs-Respondents,

N. Bard

—against—

J.E. GUERTIN Co., *et ano.*,

Defendants-Appellants,

J.A. Magee

and

JOHN SCHEUER, *et ano.*,

Defendants-Respondents.

Order, Supreme Court, Bronx County (Bloustein, J.), entered on or about June 5, 1980 affirmed, without costs and without disbursements. See *Ranz* v. *Sposato* (App. No. 8932, —— A D 2d ——) decided simultaneously herewith.

Appendix B

Murphy, P.J. dissents in a memorandum as follows:

I would revert the order of the Supreme Court, Bronx County (Bloustein, J.), entered June 5, 1980, and I would grant appellants' motion for summary judgment vacating the attachment and dismissing the complaint as against them.

While the instant motion was brought under CPLR § 3211(a) subd. 8, it should be treated as a motion for summary judgment under CPLR § 3212 since issue had already been joined in this case prior to the motion. Upon the motion for summary judgment, I would permit appellants to amend their answer to assert the defense under *Rush* v. *Savchuk* (—— U.S. ——, 100 S.Ct. 571), and I would then grant summary judgment to them for the same basic reasons stated by Justice Ross in his dissent in *Ranz* v. *Sposato* (App. No. 8932, —— A.D. 2d ——) decided simultaneously herewith. I would only stress one additional ground for dismissing the complaint.

Appellants' answer was served before the United States Supreme Court's decision in *Rush, supra.* Thus, at the time the appellants' answer was served, *Seider* v. *Roth* (17 N Y 2d 111) was still the controlling case law in New York State. Hence, the service of process in this case was lawfully effected under CPLR § 314(3) when it was originally made. Therefore, prior to *Rush,* it would have been a futile act for appellants either to make a pre-answer motion to dismiss under CPLR § 3211(a) subd. 9 or to preserve a defense thereunder in their answer.

Once *Rush* had been decided, the appellants had the right to reflect the defense then permitted by *Rush.* Clearly, appellants had not waived, nor could they have waived, a defense under CPLR § 3211(a) subd. 9 because

that defense never existed when their answer was served. CPLR § 3211(e), insofar as it relates to a possible waiver of a defense under CPLR § 3211(a) subd. 9, must be limited to a waiver of those meritorious defenses that exist when a pre-answer motion is made or the answer is served (*cf. Rich* v. *Rich*, —— Misc. 2d ——, 426 N.Y.S. 2d 936).

Order filed.

APPENDIX C

Order and Decision of Supreme Court of the State of New York, County of Bronx: Special Term Part I

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF BRONX—SPECIAL TERM PART I

Index No. 14189/79

ANDREA CACHAT, an infant over the age of 14 years by her father and natural guardian MARC CACHAT and MARC CACHAT, individually,

Plaintiffs,

against

J.E. GUERTIN CO., INC., RICHARD HOWARTH, JOHN SCHEUER and JAMES SCHEUER,

Defendants.

BLOUSTEIN, J:

Motion by defendant, J. E. Guertin, Inc., and Elmer Richard Howarth, to vacate the order of attachment dated October 12, 1979 and to dismiss the above entitled action is disposed of as follows:

This is an action brought to recover damages for personal injuries and loss of services sustained by the plaintiffs as a result of the alleged negligence of the defend-

ants. The action arises out of an automobile accident which allegedly occurred in the State of Rhode Island. The plaintiffs are residents of New York. The defendant is a Massachusetts corporation doing business in that state. The defendant, Elmer Richard Howarth s/h/a is a resident of Massachusetts.

By order of the Honorable Alexander Chananau, dated October 12, 1979, an attachment of a policy of insurance issued to defendant, J.E. Guertin Co. Inc., by the Travelers Insurance Company was granted, and a levy was executed on said insurance company, which has an office in the State of New York. Subsequently, the defendants were served with summons and complaint in the State of Massachusetts.

The order of attachment herein was based upon the decision of the New York State Court of Appeals in the case of Seider v. Roth, 17 N Y 2d 111, which held that the obligation of a liability insurer, doing business in New York, to defend and indemnify its insured against any claims under the policy, was a "debt" owing to the insured and such debt was subject to attachment under the provisions of CPLR 6202.

This method of attachment was appealed to the United States Supreme Court in Rush v. Savchok, 100 S. Ct. 571 (1980). The court held that such attachments violate the due process clause of the United States Constitution.

Movant seeks to vacate and set aside the order of attachment herein and dismissing all claims by the plaintiff and co-defendants against him in that the court lacks jurisdiction over the defendant. The movants argue that in view of this Supreme Court determination, the court lacks jurisdiction to adjudicate the claims of the respective parties to this action.

Appendix C

In Kalmas v. Neuman, N.Y.L.J. 2/8/80, p. 13, col. 2 (Supreme Court, Queens), Justice Harold Hyman, under similar facts and circumstances, refused to vacate an order of attachment:

> "To give retrospective effect (to Savchok) would cause chaos to final judgment already rendered, as to the rights of claimant-litigants on matters brought before such decision against whom the defense of Statute of Limitations might now be asserted, that it would violate public policy of seeking quietude in the administration of justice as well as fairness (Linkletter v. Walker, 331 U S 618)".

It appears that retroactive application of the Savchok decision would be unjust in that it would deprive litigants of their day in court. Movants application seeking to vacate the within order of attachment and dismissing the action is denied.

Dated: June 3, 1980

F. W. B.
J.S.C.

Opposition

81-696

Office - Supreme Court, U.S.
FILED
OCT 30 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

J. E. GUERTIN CO., RICHARD HOWARTH,

Petitioners,

against

ANDREA CACHAT, an infant over the age of 14 years by her father and natural guardian MARC CACHAT and MARC CACHAT, Individually, and JOHN SCHEUER and JAMES SCHEUER,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SANDRA F. KREVITSKY
Attorney for Respondents
600 Old Country Road
Garden City, New York 11530
(516) 294-0100

Question Presented

Did the New York Court of Appeals base its decision upon an adequate and independent state ground so as to preclude a federal question for review by this Court in holding that petitioners waived their objection to New York basis jurisdiction by their failure to preserve their objection thereto by motion or affirmative defense as specifically required by CPLR Sec. 3211 subd. (e) and that, therefore, this Court's decision in *Rush* v. *Savchuk*, 444 U.S. 321 was not retroactive as to petitioners because of this waiver?

Answer: Yes.

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Statutes Cited

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Other Authorities Cited

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

J. E. GUERTIN CO., RICHARD HOWARTH,

Petitioners,

against

ANDREA CACHAT, an infant over the age of 14 years by her father and natural guardian MARC CACHAT and MARC CACHAT, Individually, and JOHN SCHEUER and JAMES SCHEUER,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion of the New York Court of Appeals is set forth in the appendix of the appellant's petition at pages 1a-17a. The opinions of the Appellate Division, First Department are set forth in the appendix at pages 18a-22a of the appellant's petition. The Order of the New York Supreme Court, Bronx County, is set forth in the appendix at pages 23a-25a of the appellant's petition.

Jurisdiction

The jurisdiction of this Court is invoked under 28 USCA, Sec. 1257(3). The judgment of the New York Court of Appeals was entered on July 7, 1981.

Statutes Involved

New York State

CPLR 314(3) provides:

> "Service may be made with the state by any person authorized by section 313 in the same manner as service is made within the state:
>
> 3. where a levy upon property of the person to be served has been made within the state pursuant to an order of attachment or a chattel of such person has been seized in an action to recover a chattel.

CPLR 320(c)(i)

> "(c) When appearance confers personal jurisdiction in certain actions; limited appearance. When the court's jurisdiction is not based upon personal service on the defendant, an appearance is not equivalent to personal service upon the defendant:
>
> 1. in a case specified in subdivision (3) of section 314, if jurisdiction is based solely upon a levy on defendant's property within the state pursuant to an order of attachment; or

CPLR 3211(a)(7)(9)(e)

> Rule 3211. Motion to dismiss

"Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes asserted against him on the ground that:

7. the pleading fails to state a cause of action; or

9. the court has not jurisdiction in an action where service was made under section 314 or 315; or

(e) Number, time and waiver of objections; motion to plead over. At any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a), and no more than one such motion shall be permitted. Any objection or defense based upon a ground set forth in paragraphs one, three, four, five and six of subdivision (a) is waived unless raised either by such motion or in the responsive pleading. A motion based upon a ground specified in paragraphs two, seven or ten of subdivision (a) may be made at any subsequent time or in a later pleading, if one is permitted. An objection based upon a ground specified in paragraphs eight or nine of subdivision (a) is waived if a party moves on any of the grounds set forth in subdivision (a) without raising such objection or if, having made no objection under subdivision (a), he does not raise such objection in the responsive pleading. Where a motion is made on the ground set forth in paragraph seven of subdivision (a), or on the ground that a defense is not stated, if the opposing party desires leave to plead again in the event the motion is granted, he shall so state in his opposing papers and may set forth evidence that could properly be considered on a motion for summary judgment in support of a new pleading; leave to plead again shall not be granted unless the court is satis-

fied that the opposing party has good ground to support his cause of action or defense; the court may require the party seeking leave to plead again to submit evidence to justify the granting of such leave."

Statement of the Case

We adopt petitioners' statement of the case.

Reasons for Denying the Writ

It is the time-honored policy of this Court to deny review of state court judgments which rest upon adequate and independent non-federal grounds.

> *Herb* v. *Pitcairn,* 325 U.S. 118 (1945);
> *Zacchini* v. *Scripps-Howard Broadcasting,* 433 U.S. 568 (1977).

This "well-established principle of federalism", necessary to avoid rendering of advisory opinions, is applicable even if the state court may have based its decision on an erroneous view of the federal law. If the state decision also rests on an independent non-federal ground, this Court will decline jurisdiction.

> *Radio Station WOW, Inc.* v. *Johnson,* 326 U.S. 120 (1945);
> *Arkansas Southern R.R. Co.* v. *German National Bank,* 28 S.Ct. 78 (1907).

All that is necessary to preclude this Court's review is that the decision of the state court rest upon a fair and substantial basis. The state decision may not be so plainly

unfounded as to be a clear evasion of its constitutional obligations or a "mere device to prevent review" of a federal question.

Demorest v. *City Bank Farmers Trust*, 321 U.S. 36 (1944);
McCoy v. *Shaw*, 277 U.S. 302 (1928);
National Association for the Advancement of Colored People v. *State of Alabama*, 357 U.S. 449 (1958).

It is essential to this Court's jurisdiction that a federal question was actually presented to the state's highest court and considered and decided by it. If it appears from its decision that the state court *might* have rendered its opinion on adequate and independent state grounds, this Court has declared it will not review.

Stembridge v. *State of Georgia*, 343 U.S. 541 (1952);
Lynch v. *People of N.Y. ex rel Pierson*, 293 U.S. 52 (1934)

Significantly, this Court stated in *Henry* v. *Mississippi*, 379 U.S. 443, 446 (1965):

> "The principles at this court were declined to review state court judgments which rest on independent and adequate state grounds, even where these judgments also decide federal questions . . . applies not only in cases involving state substantive grounds, *Murdock* v. *City of Memphis*, 20 Wall. 590, 22 L.Ed. 429, but also in cases involving state procedural grounds. Compare *Herb* v. *Pitcairn*, 324 U.S. 117, 125-126, 65 S.Ct. 459, 462-463, 89 L.Ed. 789 with *Davis* v. *Wechsler*, 263 U.S. 22, 44 S.Ct. 13, 68 L.Ed. 143."

Further, the procedural default under state law of a constitutional objection by a party in a state action would normally not present a federal question because of waiver.

Orr v. *Orr*, 440 U.S. 268 (1979)
Beaupre v. *Noyes*, 138 U.S. 397.
C. Wright, Federal Cts. 541-542 (3rd Ed., 1976)

In the instant case, the New York Court of Appeals fully complied with the decision of this Court in *Rush* v. *Savchuk*. In the five cases consolidated for review, the Court of Appeals held that in those cases including the instant case, in which the objection to the quasi in rem basis jurisdiction was not pleaded with specificity pursuant to CPLR Sec. 3211(e), then that objection was waived. Thus, the Court did not have before it the federal question of retroactivity of the *Rush* decision, since it deemed the issue to have been waived by an intentional procedural default under state law. As to those cases which had interposed the proper defenses the Court of Appeals applied *Rush* retroactively.

We submit, therefore there is an adequate and independent non-federal ground resting on a fair and substantial basis. Clearly, the intent of the Court was not to provide a subterfuge for evasion of constitutional rights, since in those cases which the jurisdictional objection was interposed, the court affirmed dismissal of the complaint.

Furthermore, the defense of lack of quasi in rem basis jurisdiction was specifically provided for by state law in CPLR 3211(e). In *Curtis Publishing* v. *Butts*, 388 U.S. 130 (1967) which petitioner cites, it was the very fact that the trial attorney relied on defenses provided by state law which this Court held reasonably kept him from asserting novel constitutional arguments. This clearly is not the situation in the instant case.

Therefore, since the judgment of the New York Court of Appeals rested on an adequate and independent state ground and did not decide the federal question as to petitioner, the writ should be denied.

> *Durley* v. *Mayo*, 351 U.S. 277 (1956)
> *Jankovich* v. *Indiana Toll Road Comm.*, 379 U.S. 487 (1965)

Finally, were this Court to deem that a federal question exists, we would urge this Court to decline to exercise jurisdiction in this case, since in our view the instant federal question falls far short of being a substantial one. Although there is "no formula which reveals the precise amount of importance that will move . . . (this) Court to grant certiorari," the existence of admittedly "serious legal questions" may not be sufficient.

> *English* v. *Cunningham*, 361 U.S. 905, 907 (1959); Stern & Gressman, S.Ct. Prac. 5th Ed., Sec. 4.11, p. 285

As this Court is well aware, there are only two or three states in the country which permitted jurisdiction founded on the attachment of an out-of-state defendant's insurance policy. Therefore, clearly, the importance of the issue to the country as a whole would not be served by review of the New York Court of Appeals judgment concerning this issue.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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